UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., et al. Plaintiffs v. DONALD J. TRUMP, President, et al. Defendants	)	Civil Action No. 17-cv-330

DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

EXECUTIVE ORDERS

FEDERAL REGULATIONS

FEDERAL RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Three religious leaders and a church have filed a Motion to Intervene, ECF No. 5, requesting that the Court make them parties in this action through intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, alternatively, permissive intervention under Rule 24(b)(1)(B). The proposed intervenors should not be permitted to enter the action as parties; at most, they should be permitted to participate as amici curiae.

The Court should not even reach the motion to intervene, because the Court should first address the defendants' motion to dismiss for lack of subject matter jurisdiction,[1] and it should dismiss the case based on that motion. Intervention is improper when a court lacks subject matter jurisdiction over the original action, and the intervention of a new party cannot cure a lack of jurisdiction.

If the Court were to reach the motion to intervene, intervention should still be denied. While the proposed intervenors' desire to be heard in this litigation is understandable, and they offer a unique perspective that could be valuable to the Court, they do not meet the requirements for intervention, and it would be more appropriate for them to advance their arguments through participation as amici curiae. The proposed intervenors do not meet the requirements for intervention of right, because they do not have an interest in the outcome of the action that would meet the requirements of Rule 24(a)(2). Intervention under Rule 24(a)(2) requires an interest that is sufficient to meet the requirements of Article III standing, and the proposed intervenors do not meet that requirement, because a judgment for the plaintiffs in this case would not pose any immediate harm to the proposed intervenors' interests. Entry of the relief requested by the plaintiffs would not necessarily lead to action being taken against the proposed intervenors. In

[1] Defs.' Mot. to Dismiss for Lack of Subject Matter Juris. or for Failure to State a Claim, ECF No. 16.

addition, intervention of right is permitted only when the proposed intervenors show that they are not adequately represented by the original parties. In this case, the Government and the proposed intervenors are seeking the same outcome—dismissal of the suit with no relief for the plaintiffs.

The proposed intervenors also do not meet the requirements for permissive intervention. Permissive intervention under Rule 24(b)(1)(B) requires a "claim or defense" for which there is an independent basis for jurisdiction. The proposed intervenors do not seek to assert any claim or defense of their own in this action; instead, the "defenses" listed in their proposed pleading appear to be defenses they believe the Government should raise against the claims raised by the plaintiffs. Even if the proposed intervenors could meet the requirements of Rule 24(b)(1)(B), the Court always has discretion to deny permissive intervention, and the Court should deny intervention here given that the proposed intervenors' interests are not directly threatened in the action and their involvement would add to the complexity of the litigation.

If intervention were permitted, the Court should exercise its discretion to impose limits on that intervention and should confine the participation of the proposed intervenors to the submission of briefs addressing the merits.

Thus, the Court should dismiss the action before it considers the motion to intervene, but if it reaches the motion to intervene, intervention should be denied. The Government would not oppose a request by the proposed intervenors to participate as amici curiae, however.

BACKGROUND

I. Statutory and Regulatory Background[2]

Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), provides an exemption from federal income tax for nonprofit organizations meeting certain requirements:

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in [26 U.S.C. § 501(h)]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id. § 501(c)(3).

The exemption is available only to organizations that do not engage in political campaign activity. *Id.* ("which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office"). This restriction on political campaign activity, which was introduced in the Internal Revenue Code of 1954, § 501(c)(3), 68A Stat. 1, 163, is sometimes known as the "Johnson Amendment" (after then-Senator Lyndon Johnson). The restriction is absolute—to qualify for the § 501(c)(3) exemption, an organization may not participate or intervene in any political campaign for or against a candidate for public office. An organization that engages in such political campaign activity is considered an "action" organization and does not qualify for the § 501(c)(3) exemption. Treas. Reg. § 1.501(c)(3)-1(c)(3).

[2] Background sections I to III in this memorandum are identical to the corresponding sections in the Defendants' Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction or for Failure to State a Claim, ECF No. 17.

Activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, for example, written or oral statements on behalf of or in opposition to such a candidate. *See id.* § 1.501(c)(3)-1(c)(3)(iii). Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1421. The IRS has published revenue rulings and guidance to help taxpayers understand and comply with the terms of § 501(c)(3) and its implementing regulations. For example, Revenue Ruling 2007-41, published in 2007, describes 21 different factual situations and analyzes whether they amount to participation or intervention in a political campaign. *Id.* at 1422–26. The restrictions on political campaign activity are also among the subjects discussed in IRS Publication 1828, which provides guidance on numerous tax issues facing churches and religious organizations. *See* Tax Exempt & Gov't Entities, Internal Revenue Serv., Pub. 1828, Tax Guide for Churches & Religious Organizations 7–18 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf.

In § 7611 of the Internal Revenue Code, Congress prescribed procedures the IRS must follow before it may conduct an examination of a church. 26 U.S.C. § 7611 (originally enacted as Tax Reform Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494, 1034). The IRS may initiate a "church tax inquiry" only if an appropriate high-level Treasury official reasonably believes that a church may not be exempt from tax or may be carrying on an unrelated trade or business. *See id.*; *see also id.* § 513 (unrelated trade or business). In addition, before beginning the church tax inquiry, the IRS must provide written notice to the church of the inquiry. *See id.* § 7611(a)(3). An examination of a church's corporate and financial records may begin only after written notice of the examination has been provided and the church has been permitted to request

a conference. *See id.* § 7611(b). After an examination, the IRS may determine that a church is not exempt from taxation or is not eligible to receive tax-deductible contributions, or the IRS may issue a notice of deficiency to the organization or, in certain cases, assess an underpayment of tax. *See id.* § 7611(d)(1). However, the IRS may make such a determination "only if the appropriate regional counsel . . . determines in writing that there has been substantial compliance with the requirements of this section and approves in writing of such revocation, notice of deficiency, or assessment." *Id.* The provisions of § 7611 are applicable to any church tax inquiry—they are not limited to situations where a church is believed to have engaged in political campaign activity.

II. Executive Order No. 13,798

On May 4, 2017, the President issued an Executive Order addressing religious liberty. Exec. Order No. 13,798, Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 4, 2017). The stated purpose of the Order is to "guide the executive branch in formulating and implementing policies with implications for the religious liberty of persons and organizations in America, and to further compliance with the Constitution and with applicable statutes and Presidential Directives." *Id.*

Section 2 of the Order directs that, in enforcement of the tax laws, including the political campaign activity provisions of Internal Revenue Code § 501(c)(3), the Government should not take adverse action based on speech "from a religious perspective" that it would not take based on speech "of similar character" that does not reflect a religious perspective:

> Sec. 2. *Respecting Religious and Political Speech.* All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech. In particular, the Secretary of the Treasury shall ensure, to the extent permitted by law, that the Department of the Treasury does not take any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or

> organization speaks or has spoken about moral or political issues from a religious perspective, *where speech of similar character has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office by the Department of the Treasury*. As used in this section, the term ''adverse action'' means the imposition of any tax or tax penalty; the delay or denial of tax-exempt status; the disallowance of tax deductions for contributions made to entities exempted from taxation under section 501(c)(3) of title 26, United States Code; or any other action that makes unavailable or denies any tax deduction, exemption, credit, or benefit.

Exec. Order No. 13,798, § 2 (emphasis added).

The Order explicitly disclaims any intent to modify substantive law or grant any enforceable legal rights. Section 2 twice specifies that it applies "to the extent permitted by law." *Id.* Subsection 6(b) specifies that the Order "shall be implemented consistent with applicable law." *Id.* § 6(b). Subsection 6(c) specifies that the Order "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." *Id.* § 6(c).

III. The Present Lawsuit

On May 4, 2017, the same day the Executive Order was issued, plaintiffs Freedom from Religion Foundation, Inc. (FFRF), Dan Barker, and Annie Laurie Gaylor filed this action against the President and the Commissioner of the Internal Revenue Service. The plaintiffs assert that the Executive Order "requires the IRS to selectively and preferentially discontinue enforcement of the electioneering restrictions of the tax code against churches and religious organizations, while applying a more vigorous enforcement standard to secular nonprofits." Compl. for Declaratory and Injunctive Relief ¶ 3, ECF No. 1. By doing so, the plaintiffs assert, the Executive Order violates the Free Speech Clause and the Establishment Clause of the First Amendment; the Equal Protection Clause; the Take Care Clause, U.S. Const. art. II, § 3; and the separation of powers.

See, e.g., Compl. ¶¶ 10–12, 80, 86–87, 92–93; Compl. at 19 (requests for relief). The plaintiffs seek declaratory and injunctive relief against the Executive Order and its enforcement. Compl. at 19.

While the plaintiffs' complaint makes mention of Internal Revenue Code § 7611, the provision establishing special procedures for church tax inquiries, *see* Compl. ¶¶ 38–39, the plaintiffs do not appear to be challenging that provision. Instead, their claims appear to focus exclusively on the Executive Order.

IV. Motion to Intervene

On June 29, 2017, Charles Moodie, Koua Vang, Patrick Malone, and Holy Cross Anglican Church filed a Motion to Intervene, ECF No. 5, seeking to be added as defendants. The proposed intervenors assert that the plaintiffs' suit threatens to prevent them from expressing their religious beliefs and threatens their rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, and the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Assembly Clause of the First Amendment. They ask the Court to permit intervention of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b). The proposed intervenors state that, if they are permitted to intervene, they intend to file a dispositive motion at the pleading stage and, if the case proceeds beyond the pleading stage, take discovery from FFRF and the IRS. *See* Mot. to Intervene 1; Br. in Supp. of Mot. to Intervene 22, 25, ECF No. 6.

ARGUMENT

I. Standards Applicable to a Motion to Intervene

Rule 24 of the Federal Rules of Civil Procedure provides two mechanisms through which a party may intervene in an action. First, a court must permit "intervention of right" under Rule 24(a)(2) when the proposed intervenors establish that "(1) the motion to intervene is timely filed;

(2) the proposed intervenors possess an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the named parties inadequately represent that interest." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 657–58 (7th Cir. 2013) (citing *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007)).

Alternatively, a court may authorize "permissive intervention" under Rule 24(b)(1)(B) if "the applicant's claim and the main action share common issues of law or fact and . . . there is independent jurisdiction." *Ligas*, 478 F.3d at 775. Even if the party seeking to intervene meets the requirements for permissive intervention, the Court has discretion to deny it. *See id.* ("[P]ermissive intervention is within the discretion of the district court . . . ."); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) ("Permissive intervention under Rule 24(b) is wholly discretionary . . . .").

II. The Court Should Consider the Defendants' Motion to Dismiss Before Considering the Motion to Intervene, Because There Is No Basis for Intervention in a Suit over Which the Court Lacks Subject Matter Jurisdiction.

The Court should not even reach the motion to intervene, because intervention is not proper in a case where a court lacks subject matter jurisdiction. The Court should address the defendants' motion to dismiss for lack of subject matter jurisdiction first, and it should dismiss this case based on that motion.

A court generally should resolve issues of subject matter jurisdiction before it considers other issues. *See* Defs.' Mem. in Supp. of Mot. to Dismiss for Lack of Subject Matter Juris. or for Failure to State a Claim 7–8. Moreover, intervention, if permitted, would not affect the jurisdictional analysis. "Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action. Intervention presupposes the pendency of an action in a court of competent jurisdiction and cannot create jurisdiction if none existed before." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure

§ 1917 (3d ed. 2007) (footnote omitted); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (noting that entry of an intervening plaintiff into a suit cannot cure a lack of jurisdiction); *see also Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 490 & n.10 (7th Cir. 1990) (upholding a district court's decision to dismiss the case for lack of subject matter jurisdiction and noting that that ruling made it unnecessary to consider the Government's motion to intervene, which had been denied by the district court); *Lardas v. Grcic*, 847 F.3d 561, 571 (7th Cir. 2017) (affirming the district court's dismissal of the original action for lack of standing and noting that that ruling left the proposed intervenor with "no live case in which he might intervene"), *petition for cert. filed*, (U.S. June 13, 2017) (No. 16-1508).

Thus, the Court should simply dismiss this case and should deny the motion to intervene as moot.[3]

III. The Proposed Intervenors Do Not Meet the Requirements for Intervention of Right Under Rule 24(a)(2) Because this Case Does Not Pose any Threat of Direct Harm to Their Interests, and Their Interests Are Adequately Represented by the Government.

A. A ruling in this case would not cause direct harm to the proposed intervenors, and thus they cannot establish a concrete injury under Article III of the Constitution and do not meet the requirements of Rule 24(a)(2).

The proposed intervenors do not meet the requirements for intervention of right under Rule 24(a)(2). Under Rule 24(a)(2), a proposed intervenor must have an interest in the litigation that is sufficiently direct and concrete to establish standing under Article III of the Constitution. The proposed intervenors here do not present such an interest—a ruling for the plaintiffs in this

[3] The defendants would not object to an appropriate request by the proposed intervenors for leave to submit a brief as amici curiae on the Government's motion to dismiss. *See generally Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544−45 (7th Cir. 2003) (Posner, J., opinion in chambers) (explaining standards for evaluating requests for leave to participate in a case as amicus curiae).

case would not necessarily lead the proposed intervenors to lose their tax-exempt status or suffer any other concrete harm.

The Seventh Circuit has explained that intervention under Rule 24(a)(2) requires an interest in the litigation that is at least sufficiently direct and concrete to meet the requirement of standing under Article III of the Constitution. *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (holding that the "interest" required for intervention under Rule 24(a)(2) must be "more than the minimum Article III interest"); *Bond v. Utreras*, 585 F.3d 1061, 1069–70 (7th Cir. 2009) ("[W]e have held that standing is necessarily a component of intervention as of right under Rule 24(a) . . . ." (citing *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996))).[4] As explained in the defendants' memorandum in support of their motion to dismiss, to establish standing, a party must establish three elements:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action . . . ; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also* Defs.' Mem. in Supp. of Mot. to Dismiss for Lack of Subject Matter Juris. or for Failure to State a Claim 9–10.

As the defendants explained in connection with their motion to dismiss, the plaintiffs in this action cannot establish standing because their claim of injury is based on an unfounded assertion that the challenged Executive Order exempts religious organizations from the political

[4] The Supreme Court recently held that "*at the least*, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (emphasis added)). The Court ruled narrowly and did not examine whether intervenors must show Article III standing at earlier stages or in other circumstances. Thus, the Court did not disturb the Seventh Circuit precedent requiring any intervenor to make an equivalent showing as part of demonstrating an interest under Rule 24(a)(2).

campaign activity provisions of Internal Revenue Code § 501(c)(3), 26 U.S.C. § 501(c)(3). That assertion is mistaken and is not supported by either the text of the Executive Order or the allegations of the complaint. *See* Defs.' Mem. in Supp. of Mot. to Dismiss for Lack of Subject Matter Juris. or for Failure to State a Claim 10–16. The proposed intervenors similarly do not meet the requirements of standing. Because the Executive Order does not *grant* an exemption to religious organizations, a court ruling barring enforcement of the Executive Order likewise would not *take away* any such exemption, or any other legal right. *See* Exec. Order No. 13,798, Promoting Free Speech and Religious Liberty, § 6(c), 82 Fed. Reg. 21,675 (May 4, 2017) (specifying that the Order does not modify substantive law or grant enforceable legal rights); *see also* Defs.' Mem. in Supp. of Mot. to Dismiss for Lack of Subject Matter Juris. or for Failure to State a Claim 6 (noting other language in sections 2 and 6 of the Executive Order making clear that the Order is intended to operate in accordance with existing law and does not modify substantive law or grant any enforceable legal rights).

The proposed intervenors also have not shown that they have been threatened with adverse action based on the § 501(c)(3) provisions regarding political campaign activity, nor have they shown that a ruling for the plaintiffs in this case would necessarily lead the IRS to enforce the § 501(c)(3) restrictions against them in particular. The Supreme Court has held that to demonstrate injury based on the possibility of future enforcement action, a plaintiff must demonstrate that he intends to engage in prohibited conduct and faces a "credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The proposed intervenors' statements do not make it clear that they intend to take action that qualifies as political campaign activity under § 501(c)(3). *See, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424 (noting that the

restrictions on political campaign activity do not prevent § 501(c)(3) organizations from taking "positions on public policy issues, including issues that divide candidates in an election for public office"). But even assuming that their statements are sufficient to establish an intent to engage in prohibited conduct, the proposed intervenors do not show a "credible threat of prosecution." They state that the IRS has never enforced the political campaign activity restrictions against them, *see* Mot. to Intervene 1; Br. in Supp. of Mot. to Intervene at 7, and they do not identify any adverse actions taken against similarly situated persons or organizations. They state in broad terms that the IRS has threatened enforcement, but the Supreme Court has held that bare assertions of this kind, without specific details, do not establish standing. In *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), for example, the Supreme Court found that the plaintiffs' general assertions that their communications were subject to government surveillance should be disregarded because the plaintiffs did not provide any "specific facts" supporting those general assertions. *Id.* at 1149. By comparison, in *Susan B. Anthony List*, the plaintiffs established standing by providing specific information demonstrating a credible threat of prosecution, including the fact that one of the plaintiffs had been the subject of a past complaint and the fact that, each year, the Ohio Elections Commission handled between 20 to 80 complaints under the challenged State statute. *See Susan B. Anthony List*, 134 S. Ct. at 2345. Because they have not shown that they themselves will be directly injured by a ruling in favor of the plaintiffs, the proposed intervenors do not meet the requirements of standing and therefore also do not meet the requirements of Rule 24(a)(2). *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (holding that discrimination "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct").

The proposed intervenors argue that the Court held that Father Malone and Holy Cross Anglican Church had a sufficient interest to intervene of right in *Freedom from Religion Foundation, Inc. v. Koskinen*, 298 F.R.D. 385 (W.D. Wis. 2014). But the Court in that case did not address the Seventh Circuit precedent establishing that to meet the requirements for intervention of right, a proposed intervenor must be able to meet the requirements of Article III standing. Indeed, if the Court had addressed that precedent, it might have ruled differently. The Court remarked that the proposed intervenors were not directly threatened by the lawsuit. Instead, the Court observed, "the threat to [the proposed intervenors'] interest [was] at least one step removed from this lawsuit," and "it [was] uncertain whether the IRS, if compelled to enforce the electioneering restrictions against churches, would ever take any action against Father Malone or Holy Cross." *Id.* at 386. The proposed intervenors thus might not have been permitted to intervene if the Court had analyzed their interest under the standards of Article III.

B. The proposed intervenors' interests in the case are adequately represented by the Government.

A separate reason the proposed intervenors fail to qualify for intervention of right is that their interests are adequately represented by the Government, which shares the proposed intervenors' goal of repelling this lawsuit.

In *Solid Waste Agency v. U.S. Army Corps of Engineers*, 101 F.3d 503 (7th Cir. 1996), a village government and a citizen group sought to intervene in a suit alongside the Federal Government defendants. *Id.* at 504. The Seventh Circuit held that the proposed intervenors failed to show they were not adequately represented by the Federal Government. The court explained that "[w]here the interests of the original party and of the intervenor are identical—where in other words there is no conflict of interest—adequacy of representation is presumed." *Id.* at 508. The court noted that the proposed intervenors had the same primary goal as the Federal

Government—to "defeat [the plaintiff's] effort to invalidate" the Federal Government's action. *Id.* The court acknowledged that the United States likely had "additional interests" not shared by the proposed intervenors, but it held that that "diversity of . . . interests" was not enough to establish that the proposed intervenors were not adequately represented. *Id.*

The same reasoning led to the same result in *Wisconsin Education Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). Municipal employees sought to intervene to join the defense of a State statute. *Id.* at 644. The Seventh Circuit held that the employees could not intervene, in part because they were adequately represented by the State Government. *Id.* at 659. The court observed that the employees and the State had "exactly the same goal" in the litigation—"protecting [the challenged statute] against the [plaintiffs'] constitutional challenge." *Id.* "[Q]uibbles with the state's litigation strategy," the court held, were not enough to demonstrate a conflict of interest. *Id.*

This case is of a piece with *Solid Waste Agency* and *Wisconsin Education Ass'n Council*. The proposed intervenors and the Government have the same primary goal in the litigation—to repel the plaintiffs' challenge to the Executive Order. This triggers a presumption of adequate representation. The Government's general need to weigh other competing interests and the possibility that the proposed intervenors might disagree with the Government about case strategy are not enough to rebut the presumption.

In *Freedom from Religion Foundation, Inc. v. Koskinen*, 298 F.R.D. 385 (W.D. Wis. 2014), the Court held that Father Malone and Holy Cross Anglican Church were not adequately represented by the IRS. *See id.* at 386–87. But that ruling is not binding precedent, and it did not distinguish or otherwise address *Solid Waste Agency* and *Wisconsin Education Ass'n Council*, which are binding precedent and should be followed in this case.

In another case involving the same plaintiffs, *Gaylor v. Lew*, No. 16-cv-215-bbc, 2017 WL 222550 (W.D. Wis. Jan. 19, 2017), this Court found that a group of intervenors (including Father Malone and Holy Cross Anglican Church) were not adequately represented by the Government defendants. *Id.* at *2. But in *Gaylor*, the court relied on an earlier Seventh Circuit case stating that intervention of right is permitted "when an original party does not advance a ground that if upheld by the court would confer a tangible benefit on an intervenor who wants to litigate that ground." *Id.* (quoting *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 985–86 (7th Cir. 2011)). In this case, a victory for the Government would not "confer a tangible benefit" on the proposed intervenors, given that the Executive Order does not confer substantive rights of any kind.

The proposed intervenors also suggest that their interests may conflict with the Government's interests because a victory for the plaintiffs could lead to increased tax revenues. *See* Mot. to Intervene 1; Br. in Supp. of Mot. to Intervene 19, 22–23. There is no reason to suspect the Government would ever seek to lose this case, so this does not weigh in favor of permitting intervention. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841–42 (9th Cir. 2011) (concluding that the proposed intervenor was adequately represented by the Government and rejecting the suggestion that the IRS's "interest in maximizing federal tax revenues might lead the federal defendants to abandon key arguments that could be marshaled in defense of the challenged statutes").

Thus, the proposed intervenors do not satisfy the requirements for intervention of right under Rule 24(a)(2).

IV. The Proposed Intervenors Do Not Meet the Requirements for Permissive Intervention Because They Do Not Seek to Present any "Claim or Defense" of Their Own for Which There Would Be an Independent Basis for Jurisdiction.

The proposed intervenors also do not meet the requirements for permissive intervention under Rule 24(b)(1)(B) because they do not seek to present any claim or defense for which there is independent jurisdiction.

Under Rule 24(b)(1)(B), a person seeking permissive intervention must present a "claim or defense." *Id.* It must be the kind of claim or defense "that can be raised in courts of law as part of an actual or impending law suit," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond v. Charles*, 476 U.S. 54, 76–77 (1986) (O'Connor, J., concurring in part and concurring in the judgment)), and for which the court has "independent jurisdiction," *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 775 (7th Cir. 2007). In this case, there are no claims that have been raised or could be raised between the plaintiffs and the proposed intervenors. The proposed intervenors lay out what they call "defenses" in their proposed answer, *see* Proposed Answer of Def.-Intervenors 16–17, but these are not defenses that could be asserted by the proposed intervenors against claims brought by the plaintiffs. Rather, they are best viewed as defenses that the proposed intervenors wish for the Government to raise against the plaintiffs' claims. But the proposed intervenors do not have authority to raise defenses on the Government's behalf, and intervention would not give them any such authority.

The proposed intervenors' proposed "defenses" perhaps could be viewed instead as claims or defenses that the proposed intervenors might seek to raise against the Government in a hypothetical future suit. But such claims could not support permissive intervention, because the Court would lack jurisdiction over the claims. The claims, if they were construed as claims against the Government, would have a number of defects that each would be independently fatal to jurisdiction: First, the proposed intervenors are not actually seeking to have any such claims

resolved in this action, so they could not support jurisdiction in this case. *See Calderon v. Ashmus*, 523 U.S. 740, 746–47 (1998) (holding that although a prisoner clearly had a concrete dispute with the State Government that would qualify as a "case or controversy" under Article III of the Constitution, Article III prevented him from bringing a lawsuit that would not resolve the entire dispute). Second, as discussed above, the proposed intervenors have not demonstrated an intent to engage in prohibited conduct and a credible threat of prosecution, and they therefore cannot meet the jurisdictional requirement of standing. *See supra* pp. 11–12. Finally, any separate claims against the Government would be barred by the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), which generally bars federal court jurisdiction over any "suit for the purpose of restraining the assessment or collection of any tax." *Id.*; *see, e.g.*, *Cleveland v. Comm'r*, 600 F.3d 739, 742 (7th Cir. 2010) (per curiam); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 738 (1974) (holding that the Tax Anti-Injunction Act barred a suit pertaining to an organization's qualification for the § 501(c)(3) exemption); 26 U.S.C. § 7428 (authorizing suits seeking declaratory relief relating to § 501(c)(3) status but specifying a narrow procedure for such suits).

Thus, the proposed intervenors cannot meet the basic requirements for permissive intervention. Even if they could, the Court should exercise its discretion to deny permissive intervention given the potential for the addition of another party to complicate the proceedings and the fact that the litigation does not pose an immediate threat to the proposed intervenors' interests. "Permissive intervention under Rule 24(b) is wholly discretionary . . . ." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000).

V. If Intervention Is Permitted, It Should Be Limited to Submission of Briefs.

For the reasons above, the case should be dismissed, and intervention should be denied. But if the Court allows the case to proceed and permits intervention, intervention should be limited to submission of briefs on the merits. The proposed intervenors should not be permitted

to file motions of their own or to take discovery. *See* Fed. R. Civ. P. 24 advisory committee's note to 1966 amendment ("An intervention of right under [Rule 24(a)(2)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring in part and concurring in the judgment) ("Even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in an-other proceeding.").

CONCLUSION

The Court should dismiss the case for lack of subject matter jurisdiction and should deny the motion to intervene as moot. If the Court reaches the motion to intervene, the request should be denied because the proposed intervenors do not meet the requirements for intervention.

Date: August 22, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JEFFREY M. ANDERSON
Acting United States Attorney

BRETT A. SHUMATE
Deputy Assistant Attorney General

LESLEY FARBY
Assistant Branch Director

s/ JAMES C. LUH
JAMES C. LUH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave NW
Washington DC 20530

Tel: (202) 514-4938
Fax: (202) 616-8460
E-mail: James.Luh@usdoj.gov
Attorneys for Defendants